RECENT DECISIONS.

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ATTORNEY AND CLIENT—LIEN ON JUDGMENT—PRIORITY OVER JUDGMENT DEBTOR'S CLAIMS.—In an action of replevin the defendant secured judgment for costs. The plaintiff sought to set off a judgment previously obtained against the defendant in another action. *Held,* the charging lien of the defendant's attorney was superior to the plaintiff's right of set-off. *Wesley* v. *Wood* (1911) 132 N. Y. Supp. 248.

The English courts formerly differed as to the extent of the protection afforded an attorney by the charging lien, *Stephens* v. *Weston* (1824) 3 B. & C. 535; *Hall* v. *Ody* (1799) 2 B. & P. 28, but by statute it is now subordinated to all the equities between the parties. 1 Jones, Liens, § 216. In this country judgments rendered in the same action may generally be set off against each other, since the attorney's lien attaches only to the balance due his client, *Bosworth* v. *Tallman* (1886) 66 Wis. 533; *Field* v. *Maxwell* (1895) 44 Neb. 900, but the lien is given precedence over judgments subsequently obtained in another action. *Caudle* v. *Rice* (1886) 78 Ga. 81; see *Warfield* v. *Campbell* (1863) 38 Ala. 527. On the question of setting off an existing independent judgment, however, the American courts differ. By the weight of authority, the attorney is considered an equitable assignee as of the date of the judgment, and holds subject to the judgment debtor's right of set-off. 1 Jones, Liens, § 217; *Ex parte Lehman* (1877) 59 Ala. 631; *contra, Phillips* v. *Mackay* (1892) 54 N. J. L. 319. But since in absence of statute the setting off of judgments is discretionary with the courts, 2 Black, Judgments, (2nd ed.) § 1000, it should not be permitted to the prejudice of a third party's rights. *Nicoll* v. *Nicoll* (N. Y. 1836) 16 Wend. 446; see *Roberts* v. *Mitchell* (1895) 94 Tenn. 277. This seems especially true where the attorney has a statutory lien on the cause of action itself. N. Y. Consol. Laws, Judiciary Law, § 475. The modern New York practice is that adopted by the principal case, *Barry* v. *R. R. Co.* (N. Y. 1903) 87 App. Div. 543; *Smith* v. *Cement Co.* (N. Y. 1905) 107 App. Div. 524, although it was formerly unsettled. See *Mohawk Bank* v. *Burrows* (1822) 6 Johns. Ch. 317; *Dunkin* v. *Vandenbergh* (1829) 1 Paige Ch. 622.

BANKRUPTCY—SURPLUS AFTER PAYMENT OF CLAIMS—ALLOWANCE OF INTEREST.—A creditor asked for the interest which had accrued on his claim subsequently to the filing of a voluntary petition in bankruptcy. The trustee in bankruptcy had a surplus after the settlement of all claims against the bankrupts. *Held,* the interest should be allowed. *Johnson* v. *Norris* (C. C. A. 5th Ct. 1911) 190 Fed. 459.

A voluntary proceeding in bankruptcy is *ex parte* and the creditors cannot resist adjudication. *In re Carleton* (1902) 115 Fed. 246; *In re Jehu* (1899) 94 Fed. 638. Accordingly, if creditors were denied interest on their claims in the unusual case where a surplus remains after paying the bankrupt's debts, a debtor would thus be enabled to procure the use of his creditors' money without cost. This fact found partial recognition in early English cases which allowed interest on

debts bearing interest by contract, while refusing it as damage for the necessary delays of the law. *Bromley* v. *Goodere* (1743) 1 Atk. 75; *Ex parte Mills* (1793) 2 Ves. Jr. 295. But interest is often given in equity when it is not contracted for, *Vail* v. *Nickerson* (1810) 6 Mass. 262; *Williams* v. *Amer. Bank* (Mass. 1842) 4 Met. 317, and courts of bankruptcy, having equity jurisdiction, see *In re Kane* (1904) 127 Fed. 552, now allow interest on all debts for delays in payment caused by the bankruptcy. *Matter of Higginbottom* (1826) 2 Glyn & Jam. 123; *Brown* v. *Lamb* (Mass. 1843) 6 Met. 203. Moreover, it has been held that this result is not affected by the section of the Bankruptcy Act which provides that all claims against the bankrupt's estate must be owing at the time the petition is filed, Act of 1898, c. 541, § 63 (30 Stat. at L. 562), because claims which have been proved and allowed are in effect judgments, and as such are entitled to subsequently accruing interest. *In re John Osborne's Sons & Co.* (1910) 177 Fed. 184; see *Nat. Bank* v. *Mechanics' Nat. Bank* (1876) 94 U. S. 437.

BANKRUPTCY—TITLE OF BANKRUPT PRIOR TO APPOINTMENT OF TRUSTEE —RIGHT TO SUE.—After filing a petition in bankruptcy, but before the appointment of a trustee, the bankrupt brought suit for a trespass to his property. *Held,* he could maintain the action. *Johnson et al.* v. *Collier* (U. S. Sup. Ct. Jan. 9, 1912). Not yet reported.

A bankrupt may of course institute legal proceedings prior to the filing of the petition, and the trustee when elected may, with the approval of the court, intervene and prosecute such suit. Bankruptcy Act of 1898, § 11-*c*. But if the trustee refuse to carry on the action, because he considers it of no benefit to the creditors, or if no trustee be appointed, by the weight of authority the bankrupt may continue to prosecute it for his own benefit; *Ramsey* v. *Fellows* (1879) 58 N. H. 607; *Griffin* v. *Mutual Life Ins. Co.* (1904) 119 Ga. 664; though in some jurisdictions he is regarded as *civiliter mortuus* after the filing of the petition, and can prosecute no action concerning his estate. *Lacy* v. *Rockett* (1847) 11 Ala. 1002; *Scheidt* v. *Goldsmith* (1902) 103 Ill. App. 623. Although the trustee's title to the bankrupt's property becomes vested as of the date of the adjudication, Bankruptcy Act of 1898, § 70, it would seem that prior to his election a defeasible title remains in the bankrupt, which he may protect by the proper actions. Loveland, Bankruptcy, (3rd ed.) § 176; *Rand* v. *Iowa Cent. Ry. Co.* (1906) 186 N. Y. 58; *Gordon* v. *Mechanics' etc. Ins. Co.* (1907) 120 La. 441. *Contra, Rand* v. *Sage* (1905) 94 Minn. 344. It would further seem that the bankrupt's title may be attacked by no one except the trustee, *Fowler* v. *Down* (1797) 1 B. & P. 44; *Ramsey* v. *Fellows supra; State ex rel.* v. *Ferris* (1875) 42 Conn. 560, since his recovery will enure to the benefit of his creditors, and will bar further suit against his debtor. *So. Express Co.* v. *Connor* (1873) 49 Ga. 415; *Thatcher* v. *Rockwell* (1881) 105 U. S. 467.

CARRIERS—LIEN ON BAGGAGE FOR FARE OF PASSENGER'S CHILD.—A railroad claimed a lien on a passenger's baggage, upon her refusal to pay her child's fare. *Held,* one judge dissenting, no such lien existed. *Cantwell* v. *Terminal Ry. Ass'n of St. Louis* (Mo. 1911) 140 S. W. 966.

A carrier's lien on freight is specific and it is therefore limited to charges incidental to the transportation of the particular shipment on

which it is claimed. 1 Jones, Liens, § 281; *Hartshorne* v. *Johnson* (1822) 7 N. J. L. 131; *Adams* v. *Clark* (Mass. 1852) 9 Cush. 215. This lien exists also on the baggage of a passenger who has refused to pay his fare, for the contract of the railroad to carry the baggage and the passenger is an entire one, *Wolf* v. *Summers* (1811) 2 Camp. 631, the transportation of the luggage being incidental to the undertaking to carry its owner. 4 Elliott, Railroads, § 1662; *Roberts* v. *Koehler* (1887) 30 Fed. 95. A failure to pay the passenger's fare, therefore, terminates the carrier's obligation to convey the baggage, and it may claim a lien thereupon for the costs of its subsequent transportation. *Roberts* v. *Koehler supra.* It is further established that an adult is liable for the fare of a child who accompanies him, and upon his refusal to pay it, he may be ejected with the child, even though himself the possessor of a ticket. *Lake Shore, etc. R. R. Co.* v. *Orndorff* (1897) 55 Oh. St. 589; *Phila. etc. R. R. Co.* v. *Hoeflich* (1884) 62 Md. 300. It would seem, therefore, that the contract to carry the passenger with his child and baggage is also entire, and hence upon failure to pay any part of the compensation for such carriage, the railroad should be entitled to claim a lien upon the baggage. Under this view the decision of the majority in the principal case is unsound.

CONFLICT OF LAWS—DIVORCE—PERSONAL OBLIGATION IMPOSED BY FOREIGN LAW.—The plaintiff, a citizen of New York, married the defendant, a Swiss citizen, in France, the matrimonial domicil being Switzerland. Eventually, the defendant brought suit for divorce in a Swiss court of admitted jurisdiction, but on a cross-bill being filed by the plaintiff she obtained the divorce. Subsequent to the marriage and prior to the divorce, the plaintiff purchased New York real estate in her own name, and conveyed to her husband, without consideration, but by full covenant and warranty deed, the undivided half interest therein sought to be recovered in this suit. No disposition of this land was made by the decree, but the law of Switzerland is that the party against whom a divorce is granted shall return to the other party all property acquired from the latter in any manner during coverture. *Held,* two judges dissenting, the plaintiff could not recover. *De Graffenried* v. *De Graffenried* (1911) 46 N. Y. L. J. No. 80. See Notes, p. 259.

CONFLICT OF LAWS—WHAT LAW GOVERNS—PRESUMPTION AS TO FOREIGN LAW.—A servant sued his master for an injury sustained in Cuba, through the latter's failure to repair defective machinery after his promise to do so upon notification. No evidence as to the Cuban law was introduced. *Held,* the plaintiff should have alleged and proved the *lex loci. Cuba R. R. Co.* v. *Crosby* (U S. Sup. Ct. Jan. 9, 1912). Not yet reported.

In the absence of proof of the *lex loci,* the *lex fori,* although of a different system of jurisprudence, is generally applied in such a case. *Savage* v. *O'Neil* (1871) 44 N. Y. 298; *Flato* v. *Mulhall* (1880) 72 Mo. 522. For reasons of necessity, the foreign and local laws are presumed to be identical, *Norris* v. *Harris* (1860) 15 Cal. 226; *Sandmeyer* v. *Ins. Co.* (1891) 2 S. D. 346, or else the parties are deemed to have adopted the latter by their failure to plead and prove the former. *Watford* v. *Lumber Co.* (1907) 152 Ala. 178; see 8 COLUMBIA LAW REVIEW 50.

But acts done abroad cannot as a rule, see *The Scotland* (1881) 105 U. S. 24, be controlled by the *lex fori,* which lacks extra-territorial force. Dicey, Confl. of Laws, (2nd ed.) 647. Logically, therefore, the plaintiff must sue on the theory that the *lex loci* created an obligation transitory in character and therefore enforceable anywhere. Cooley, Torts, (3rd ed.) 899; see *Stout* v. *Wood* (Ind. 1820) 1 Blackf. 71; *Slater* v. *Mexican R. R.* (1904) 194 U. S. 120, 126. It follows that the source of this obligation is a fact to be proved by the plaintiff. 4 Wigmore, Evidence, § 2536. But where it is a reasonable inference of fact that the *lex fori* and the *lex loci* are the same, as in the case of different common law jurisdictions, it may be so presumed. *Webster* v. *Hunter* (1878) 50 Ia. 215. So, too, the breach of a contract or a personal injury may be presumed to be actionable in all civilized countries. *Parrot* v. *Mexican Central Ry.* (1911) 207 Mass. 184, 191. Rationally, however, this presumption should be limited to such cases and where, as in the principal decision, the plaintiff relies on a peculiar and intricate legal doctrine, he should be compelled to prove that it obtained in the *locus delicti. Langdon* v. *Young* (1860) 33 Vt. 136; Story, Confl. of Laws, (8th ed.) 637-*a.*

Constitutional Law—Foreign Corporations—Right to Sue in State Courts.—A statute provided that no foreign corporation should transact business within the State, or maintain a suit in the State courts without first designating a resident agent and filing a copy of its charter with the Secretary of State. The plaintiff, without complying with the statute, sued to recover the price of an interstate shipment. *Held,* one judge dissenting, the statute was valid and precluded recovery, *Sioux Remedy Co.* v. *Cope et al.* (S. D. 1911) 133 N. W. 683.

A State may regulate the use of its courts, *Anglo-Am. Prov. Co.* v. *Davis Prov. Co.* (1902) 169 N. Y. 506, as well as the transaction of business within its borders by foreign corporations. *Paul* v. *Virginia* (1868) 8 Wall. 168. Under the latter power provision may be made for the ouster of a foreign corporation which exercises its Federal right to remove a cause, *Doyle* v. *Continental Ins. Co.* (1876) 94 U. S. 535, although the practical effect of such a statute must be to inhibit the exercise of the right. But a statute requiring a corporation to agree to surrender the same right in order to obtain permission to do intrastate business is void, *Barron* v. *Burnside* (1887) 121 U. S. 186, for a State may not make the conditions of admission to its territory violative of the Federal Constitution. *Cf. Security Ins. Co.* v. *Prewitt* (1906) 202 U. S. 246. Similarly, conditions on the right to sue in the State courts as applied to interstate transactions would seem to be void, since the right to enforce a contract is a vital part of it, see *Underwood Co.* v. *Piggott* (1906) 60 W. Va. 532, and must therefore be inviolate where the right to contract is itself inviolate. See *Belle City Co.* v. *Frizzell* (1905) 11 Ida. 1; *Coit* v. *Sutton* (1894) 102 Mich. 324. It would seem, therefore, that the decision in the principal case is erroneous, in spite of the court's denial that it restricts the right to engage in interstate commerce. A State cannot under the guise of regulating intrastate business require that which indirectly but practically burdens interstate commerce. *West Un. Tel. Co.* v. *Kansas* (1910) 216 U. S. 1. Nor will a State's power to regulate the use of its courts be availing when it is apparent to the Supreme

Court that the domestic forum is denied as a means of compelling compliance with conditions on the right to do interstate business. *Intn't'l Book Co.* v. *Pigg* (1910) 217 U. S. 91.

CONSTITUTIONAL LAW—IMPAIRING THE OBLIGATION OF CONTRACTS—QUASI-CONTRACTS.—After the plaintiff, waiving a tort, had secured judgment in quasi-contract against a corporation, a statute abolished the stockholders' statutory liability. An action was subsequently brought against the stockholders for the amount of the judgment. *Held,* the statute was unenforceable as impairing the obligation of a contract. *Douglass* v. *Loftus et al.* (Kan. 1911) 119 Pac. 74.

Since the purpose of the Constitutional provision against impairing the obligation of contracts is to give stability to the stipulations of parties, it obviously applies only to mutual agreements based upon intention, *Louisiana* v. *New Orleans* (1883) 109 U. S. 285, 288, and remedies are protected only as a means of protecting contractual rights. *Brown* v. *Kinzie* (1843) 1 How. 311. Contracts implied in law are therefore not within its meaning. *Robinson* v. *Howe* (1861) 13 Wis. 380. That the plaintiff in the principal case had waived the tort and brought an action in form *ex contractu* is therefore immaterial, since the choice was purely one of remedies. 12 COLUMBIA LAW REVIEW 62. The suit against the stockholders was to enforce their statutory liability. If that liability is *quasi-contractual,* as seems the better view, see 5 COLUMBIA LAW REVIEW 606, 607; *Hohfeld, Stockholders Individual Liability,* 9 COLUMBIA LAW REVIEW 285, 309-319, the same reasoning applies. If it is contractual, upon the theory that the corporation acts as the agent of the stockholder to make contracts for him, see *Kennedy* v. *Savings Bank* (1892) 97 Cal. 93, 96, it is clear that no contract could arise from acts essentially non-contractual. It seems safe to conclude that a person invoking the Constitutional guaranty must at least have suffered detriment in reliance upon the permanence of the then existing law. See *Hawthorne* v. *Calef* (1864) 2 Wall. 10.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—FEDERAL EMPLOYER'S LIABILITY ACT.—The plaintiffs sued the defendant railroads under the Federal Employer's Liability Act of 1908, which gives a right of action to an employee engaged in interstate commerce in case of injury through the negligence of an interstate carrier, or to his personal representative, in case of death, and which abolishes the defenses of assumption of risk and contributory negligence. *Held,* the Act is constitutional and action may be brought, as of right, in a State court having jurisdiction. *Mondou* v. *N. Y., N. H. & H. R. R. Co.* (1912) 32 Sup. Ct. Rep. 169. See Notes, p. 252.

CONSTITUTIONAL LAW—RIGHT TO CONTRACT—PROHIBITION OF EMPLOYMENT OF ALIENS ON PUBLIC WORKS.—The defendant was indicted for violating a law which provided that no alien should be employed in the construction of public works by the State or a municipality, or by persons contracting with the State. N. Y. Consol. Laws 1909, c. 31, § 14. *Held,* the statute is constitutional. *People* v. *Ludington's Sons* (N. Y. 1912) 131 N. Y. Supp. 550.

A sharp conflict of authority exists concerning this type of legislation, but such statutes are generally held to be constitutional. *In re Broad* (1904) 36 Wash. 449; *State* v. *Livingston Concrete Co.* (1906)

34 Mont. 570; *contra, Cleveland* v. *Construction Co.* (1902) 67 Oh. St. 197. In the jurisdiction of the principal case similar acts were avoided by the courts, *People* v. *Orange County Road Co.* (1903) 175 N. Y. 84, until the judicial objections were removed by a constitutional amendment. *People* v. *Metz* (1908) 193 N. Y. 148. General enactments of the same kind have uniformly been declared unconstitutional as discriminatory and as violative of the right freely to contract, *Lochner* v. *N. Y.* (1905) 198 U. S. 45; *Low* v. *Rees Printing Co.* (1894) 41 Neb. 127, but it would seem that neither of these objections may be urged against the statute in question. There is a valid and fundamental distinction between legislation of a general character and that regulating the business affairs of a State and its agents, the municipalities. *Lochner* v. *N. Y. supra; Atkin* v. *Kansas* (1903) 191 U. S. 207. A State has the same right as an individual or a corporation to specify the terms upon which it will contract, and it may therefore prescribe the conditions upon which it will allow public work to be done in its behalf. *Byars* v. *State* (1909) 2 Okla. Cr. 481; *Atkin* v. *Kansas supra.* Nor can this be said to infringe the personal liberty of the citizen, since a contractor cannot claim the right to do public work in any manner that he chooses. *People* v. *Metz supra; Byars* v. *State supra.*

CORPORATIONS—ESTOPPEL—DE FACTO CORPORATIONS.—An action was brought for rent under a contract of lease between the defendant and the plaintiff's assignor, a concern purporting to be a corporation, formed in Kansas for the sole purpose of transacting business in Oklahoma, and for that reason without authority of law. *Held,* the defendant was estopped to deny the defective organization of the company. *Lynch* v. *Perryman* (Okla. 1911) 119 Pac. 229.

In an action for the recovery of benefits conferred under an executed contract the defense of *ultra vires* is not available. *Day* v. *Buggy Co.* (1885) 57 Mich. 146. Some States extend this doctrine to an action on the *ultra vires* contract itself. *Camden etc. R. R. Co.* v. *May's Landing etc. Co.* (1886) 48 N. J. L. 530; *Bath G. L. Co.* v. *Claffy* (1896) 151 N. Y. 24; *contra, Central Trans. Co.* v. *Pullman's Car Co.* (1891) 139 U. S. 24. But as all of the acts of a *de facto* corporation are without authority, they are governed by the rules applicable to *ultra vires* acts. 1 Morawetz, Priv. Corp., (2nd ed.) § 744. The defense of *ultra vires* is not excluded in these cases, however, on the theory of estoppel, for obviously the corporation cannot be misled as to its corporate capacity, 1 Morawetz, Priv. Corp., (2nd ed.) § 750; *contra, Camden etc. R. R. Co.* v. *May's Landing etc. Co. supra,* but its exclusion rests rather on the public policy which prohibits the annuling of a company's acts because of some technical flaw. *Society Perun* v. *Cleveland* (1885) 43 Oh. St. 481; *Buffalo, etc. R. R. Co.* v. *Cary* (1862) 26 N. Y. 75. But in order to invoke this rule there must be at least a corporation *de facto,* 1 Morawetz, Priv. Corp., (2nd ed.) 746, since policy does not demand the protection of a mere nullity. In order to attain the status of a *de facto* corporation, however, it is necessary that an attempt be made in good faith to incorporate under some existing law. *Amer. L. T. Co.* v. *M. & N. W. R. R. Co.* (1895) 157 Ill. 641. As appears from the facts of the principal case, there was no law under which a valid incorporation could be made, see *Myatt* v. *Ponca Land Co.* (1904) 14 Okla. 189, and hence the defense should have been allowed.

CORPORATIONS—INSPECTION OF CORPORATE BOOKS—MOTIVE OF PETITIONER—MANDAMUS.—The relator, a stockholder, moved for a writ of mandamus to compel the defendant corporation to permit him to inspect its stock books, under a statute granting that right. Laws of 1908, c. 61. The plaintiff's purpose was inimical to the defendant. *Held,* two judges dissenting, the writ should not issue. *People ex rel. Britton* v. *Amer. Press Assn.* (N. Y. 1912) 46 N. Y. L. J. No. 97.

At common law to obtain inspection of corporate records, the shareholders had to show that it was necessary with reference to some specific controversy or the protection of some property right. *King* v. *Merchant Tailors' Co.* (1831) 2 B. & Ad. 115. Modern statutes granting the right of inspection are variously construed. In a few jurisdictions they are considered merely declaratory of the common law. *O'Hara* v. *Nat'l Biscuit Co.* (1903) 69 N. J. L. 198. In others, the right which they confer is subject only to the implied limitation that the stockholders must not be prompted by idle curiosity or improper motives. *Foster* v. *White* (1888) 86 Ala. 467; *Stone* v. *Kellogg* (1897) 165 Ill. 192. By the weight of authority, however, the statutory right is absolute, and the motive of the person seeking to exercise it is immaterial. *Henry* v. *Babcock Co.* (1909) 196 N. Y. 302; *Cincinnati, etc. Co.* v. *Hoffmeister* (1900) 62 Oh. St. 189. While recognizing this as the law of its jurisdiction, the court in the principal case nevertheless considered that it could in its discretion refuse to enforce the right by mandamus, and the decision seems sound. The legislative purpose was only to protect the stockholder as such, and it does not follow from the fact that the statutory penalty may be recovered regardless of the plaintiff's motive, that the legislature intended to force a corporation by the extraordinary remedy of mandamus to display its books to one seeking its destruction, if it chooses to pay the statutory penalty instead. But see *People ex rel.* v. *Paton* (N. Y. 1887) 20 Abb. N. C. 195; *State* v. *St. L. etc. Co.* (1888) 29 Mo. App. 301.

CORPORATIONS—FOREIGN CORPORATION—DISSOLUTION.—Under a statute providing that corporate existence should be continued after dissolution, for the purpose of winding up business, a foreign corporation was sued in tort, after it had been dissolved by the State of its domicile. The State constitution provided that no foreign corporation should "be allowed to transact business on more favorable conditions" than domestic corporations. *Held,* the action would lie. *Castle's Adm'r* v. *Acrogen Coal Co.* (Ky. 1911) 140 S. W. 1034. See Notes, p. 263.

CORPORATION—LIABILITY—ISSUE OF NEGOTIABLE INSTRUMENTS BY OFFICERS.—The president of an industrial corporation, who was also its general manager, in violation of a prohibition in the corporate by-laws issued the company's note which was transferred to the plaintiff, an innocent purchaser for value. *Held,* one judge dissenting, the corporation was liable. *Murchison Nat'l Bank* v. *Dunn Oil Mills Co.* (N. C. 1911) 73 S. E. 93.

The president of a corporation has no authority by virtue of his office alone to bind the corporation, *Wait* v. *Nashua Armory Ass'n* (1891) 66 N. H. 581, but the directors may thus empower him either expressly or by implication. Accordingly, where he has acted for the corporation without objection his authority cannot be denied, *Dougherty* v. *Hunter* (1867) 54 Pa. 380, or if he is made its general manager he necessarily acquires incidental powers, *Crowley* v. *Genesee Mining*

Co. (1880) 55 Cal. 273, though the cases are conflicting as to their extent. 3 Cook, Corporations, (6th ed.) § 716. But where his authority apparently exists it will not avail the corporation that his powers were expressly limited by its by-laws. See *Rathbun* v. *Snow* (1890) 123 N. Y. 343, 349. *Contra, Bocock's Ex'r* v. *Coal Co.* (1887) 82 Va. 913. The authority to borrow money, however, is so dangerous a power that it should not be implied from acts which in matters less hazardous might create an agency. *Exchange Bank* v. *Thrower* (1903) 118 Ga. 433. A corporation, therefore, is generally not bound by promissory notes made by its president without authority, *St. Ry. Co.* v. *First Nat'l Bank* (1896) 62 Ark. 33; *Gould* v. *Gould* (1903) 134 Mich. 515, though in the absence of evidence to the contrary there is a presumption of their validity. See *Patterson* v. *Robinson* (1889) 116 N. Y. 193, 200; *cf. St. Ry. Co.* v. *First Nat'l Bank supra; Gould* v. *Gould supra.* In accord with the principal case some courts regard this presumption as conclusive, and a *bona fide* purchaser may recover upon such an instrument. *American Ex. Nat'l Bank* v. *Oregon Pottery Co.* (1892) 55 Fed. 265. While this position is gaining in judicial favor, the resulting dangers to stockholders should not be ignored.

CORPORATIONS—OFFICERS—APPOINTEES OF A DE FACTO OFFICER.—A petition was brought to set aside the election of certain corporate directors, on the ground that the persons who had elected them were themselves only officers *de facto. Held,* the petition should succeed. *In the matter of George Ringler & Co.* (N. Y. Court of Appeals, Jan. 9, 1912). Not yet reported. See Notes, p. 265.

CORPORATIONS—SOCIETIES AND CLUBS—EXPULSION OF MEMBERS—POWER OF COURTS TO REVIEW.—The plaintiff sought reinstatement in a corporation formed for social purposes. He was expelled for publishing an article disparaging the dramatic profession, which contributed largely to the club's membership. The corporate constitution authorized expulsion for "cause." *Held,* one judge dissenting, the plaintiff's conduct did not warrant expulsion. *Barry* v. *The Players* (1911) 132 N. Y. Supp. 59.

The rule that in the absence of express authorization, private corporations may disfranchise their members only for the commission of crime or of acts materially destructive of the corporation, *Comw.* v. *St. Patrick Soc.* (Pa. 1810) 2 Binn. 441; *People* v. *Med. Soc.* (N. Y. 1857) 24 Barb. 570, is not generally applied to bodies incorporated solely for social purposes. *De Yturbide* v. *Met. Club* (1897) 11 App. D. C. 180; *Brandenburger* v. *Jefferson Club* (1901) 88 Mo. App. 148; *contra, Evans* v. *Philadelphia Club* (1855) 50 Pa. 107. Their additional right to expel for minor offenses against the corporate interests is frequently attributed to the agreement of those who subscribe to their constitution and by-laws. *Manning* v. *San Antonio Club* (1885) 63 Tex. 166; *Screwmen's Ass'n* v. *Benson* (1890) 76 Tex. 552; see *Lambert* v. *Addison* (1882) 46 L. T. R. 20. But this reasoning is applicable rather to voluntary unincorporated associations, and in as much as this power is essential to the fulfillment of the corporate purposes, it seems the sounder view to regard it as incidental to the powers expressly granted to these corporations. *De Yturbide* v. *Met. Club supra; People ex rel.* v. *Board of Trade* (1875) 80 Ill. 134. The validity of the provision being determined, it is well settled that, unless the charges be clearly frivolous, *People* v. *Uptown Ass'n* (1896)

41 N. Y. Supp. 154; see *Dawkins* v. *Antrobus* (1879) L. R. 17 Ch. D. 615, the decision of the corporate authorities is final and will not be reviewed by the courts in the absence of proof of irregularity of procedure or *mala fides*. *Brandenburger* v. *Jefferson Club supra; Comw.* v. *Union League* (1890) 135 Pa. 301; see *Loubat* v. *LeRoy* (N. Y. 1884) 15 Abb. N. C. 1. As the validity of the provision in the principal decision was not disputed, it is difficult to support the reversal of the case on its merits in the admitted absence of the above elements of jurisdiction.

DAMAGES—EVIDENCE—LOSS OF PROFITS OF PERSONALLY CONDUCTED BUSINESS.—In an action for negligence, the plaintiff who conducted a store without the aid of clerks, was allowed to testify as to what part of his profits was due to his labor. *Held*, three judges dissenting, the evidence was properly admitted. *Walsh* v. *N. Y. C. & H. R. R. R. Co.* (N. Y. Ct. of Appeals, Jan. 9, 1912). Not yet reported.

Because of their speculative character, evidence of profits as bearing on the question of damages is usually excluded. When, however, the defendant's tortious act directly interferes with the plaintiff's business, average profits in the years immediately preceding are admissible, *City of Terre Haute* v. *Hudnut* (1887) 112 Ind. 542; *Wolfe Shirt Co.* v. *Frankenthal* (1902) 96 Mo. 307, as affording the jury grounds for a reasonable inference as to damages. *Simmons* v. *Brown* (1858) 5 R. I. 299. And so where injury has been done to the person of the plaintiff, past returns from his labor may be shown. Thus an employee may prove his wages, *Braithwaite* v. *Hall* (1897) 168 Mass. 38, and a lawyer or a physician his former practice. *Walker* v. *Erie Ry. Co.* (N. Y. 1872) 63 Barb. 260; *City of Logansport* v. *Justice* (1881) 74 Ind. 378. Where the investment of the plaintiff, as in the principal case, is one of capital as well as of labor, a conflict of opinion arises as to whether average profits may be shown in order to determine the earning capacity of the plaintiff. It has been held that where the capital element greatly predominates over the personal element it should be excluded, *Weir* v. *Union Ry. Co.* (1907) 188 N. Y. 416, but where the situation is reversed, it should be admitted. *Kronold* v. *City of New York* (1906) 186 N. Y. 40. But no reason appears why such evidence should not be admitted with other proof of the extent and character of the plaintiff's business to show the amount and grade of services of which the injured man was capable. *Heer* v. *Warren-Sharf Asphalt Co.* (1903) 118 Wis. 57; *Railway Co.* v. *Posten* (1898) 59 Kan. 449.

FOREIGN CORPORATIONS—COMPLIANCE WITH CONDITIONS AFTER COMMENCING SUIT—STATUTE OF LIMITATIONS.—A foreign corporation sued without complying with conditions required before it could "prosecute or defend" in any suit. R. S. (1908) § 904. *Held*, the Statute of Limitations ran until full compliance. *Western Electric Co.* v. *Pickett* (Col. 1911) 118 Pac. 988.

The right of a foreign corporation to transact business within a State and to "maintain" suits arising therefrom in the domestic courts is generally restricted by statute. See Beale, For. Corp., § 141. Some provisions declare "wholly void" any business done without obedience to their requirements; N. D. Rev. Code § 3265; Wis. Stat. § 1770-*b*; others, in form merely prohibitory and punitive, are diversely construed. 11 COLUMBIA LAW REVIEW 779. Where transactions are de-

cleared or construed to be void, subsequent compliance is useless, *Cary-Lombard Co.* v. *Thomas* (1893) 92 Tenn. 587; *Thompson Co.* v. *Whitehead* (1900) 185 Ill. 454, but where the remedy only is suspended, future compliance removes the bar. *Buffalo Co.* v. *Crump* (1902) 70 Ark. 525; *Wood Co.* v. *Caldwell* (1876) 54 Ind. 270. In those jurisdictions, including that of the principal case, *Internatl. Co.* v. *Leschen Co.* (1907) 41 Col. 299, in which the latter view is held, the word "maintain" in the second part of the statute, is construed not as preventing the institution of a suit, but see *American Co.* v. *Bazaar* (1906) 20 S. D. 526, but simply its "continuance." *Kendrick* v. *Warren Bros.* (1909) 110 Md. 47. Suit may, therefore, be legally commenced and after abatement by the plea of non-compliance, *Cal. Sav. Soc.* v. *Harris* (1896) 111 Cal. 133, may be continued by future compliance, see *Evans* v. *Cleveland* (1878) 72 N. Y. 486, and the Statute of Limitations be tolled from the time of the actual inception of the action. See *Schermerhorn* v. *Schermerhorn* (N. Y. 1830) 5 Wend. 513. Where, however, as in the principal decision, the wording "prosecute or defend" prevents the institution of suit, the Statute runs until the condition precedent is performed. The present New York statute avoids the difficulty by providing that "unless prior to the making of such contract it shall have procured such certificate." *Wood* v. *Ball* (1907) 190 N. Y. 217.

HUSBAND AND WIFE—ENABLING ACTS—LIABILITY OF HUSBAND FOR SLANDER BY WIFE.—In a State having a married woman's separate estate act, the plaintiff, who had been injured by slanderous words spoken by the wife, joined the husband and wife as defendants. *Held,* the joinder was proper. *Poling et al.* v. *Pickens et al.* (W. Va. 1911) 73 S. E. 251.

The husband's liability at common law for the torts of his wife seems to have rested upon his absolute authority over her person and property. *Martin* v. *Robson* (1872) 65 Ill. 129. This dominion gave to him the rent and profits of her estate and the results of her labor during coverture. *Norris* v. *Corkill* (1884) 32 Kan. 409. So where the husband has been deprived of these rights, and power has been given to the wife to control her property and to sue and be sued, the reason for his responsiblity for her personal torts not committed in his presence has ceased. *Martin* v. *Robson supra;* Tiffany, Pers. & Dom. Rel., 70. Accordingly, the enabling acts, which expressly increase the rights of the wife, have sometimes been held to limit by implication the liability of the husband. They are generally considered to relieve him of responsibility for the torts committed by the wife in control of her separate property, *Quilty* v. *Battie* (1892) 135 N. Y. 201, and many courts have construed them to relieve him of liability even for the personal torts of the wife. *Schuler* v. *Henry* (1908) 42 Col. 367. In other jurisdictions, however, these acts are strictly construed, since they are in derogation of the common law, *McQueen* v. *Fulgham* (1864) 27 Tex. 463; *McElfresh* v. *Kirkendall* (1873) 36 Ia. 224, and additional legislation has been necessary to exempt the husband from liability.

INSOLVENCY—ASSIGNMENTS FOR CREDITORS—SECURED CLAIMS.—In an action by the assignee upon insolvency to convene creditors and to wind up the debtor's estate, a secured creditor sought to receive dividends on the face of his claim, as it stood at the time of the assign-

ment, without surrendering or realizing on his security. *Held,* one judge dissenting, the creditor's claim was valid. *Price* v. *Hosterman Lumber Co. et al.* (W. Va. 1911) 73 S. E. 55. See Notes, p. 255.

INSURANCE—FORFEITURE—ASSURED'S LIABILITY FOR ASSESSMENT.—An assessment company issued a policy to become void upon non-payment of any assessment, levying an assessment payable in thirty days. The insured defaulted and the company sued for the amount of the assessment. *Held,* the defendant was not liable. *Mutual Fire Co. of Portland* v. *Maple* (Ore. 1911) 119 Pac. 484.

A policy conditioned to become void upon non-payment of assessments terminates *ipso facto, Delaney* v. *Kelly* (N. Y. 1905) 103 App. Div. 409, and the risk can reattach only by reinstatement or by circumstances creating an estoppel. See *Kennedy* v. *Grand Fraternity* (1907) 36 Mont. 325; *Marvin* v. *Insurance Co.* (N. Y. 1879) 16 Hun 494. When the policy has been thus forfeited the cases are conflicting as to whether the assessments are collectible. In the absence of an express promise to pay, many courts have regarded these contracts as unilateral, upon the theory that the assessments, like premiums in an old line company, are entirely for future insurance. *Lehman* v. *Clark* (1898) 174 Ill. 279; *L'Union St. Jean Baptiste* v. *Ostiguy* (1903) 25 R. I. 478. But since under the typical assessment policy assessments are nothing more than each member's *pro rata* share of losses, the payment of which constitutes the consideration for his past insurance, Richards, Insurance Law, (3rd ed.) § 363, the better view is that these assessments are collectible even though the insured has forfeited all benefits under the policy. *Ellerbe* v. *Barney* (1893) 119 Mo. 632; *Calkins* v. *Angell* (1900) 123 Mich. 77. While in the principal case the assessment was levied in advance, yet the policy was admitted to have gone into effect. The defendant must therefore have impliedly promised to pay for the protection, and since the assessment was for an entire sum the reasonable implication is that he promised to pay that amount.

JUDGMENTS—RES ADJUDICATA—INJURIES TO PERSON AND PROPERTY.—The plaintiff sustained injuries to person and property through a negligent act of the defendant, and, having already recovered damages in respect to the latter, sought to obtain additional compensation for his personal injuries. *Held,* he was entitled to succeed. *Ochs* v. *Public Service Ry. Co.* (N. J. 1911) 80 Atl. 495. See Notes, p. 261.

MALICIOUS PROSECUTION—TERMINATION OF FORMER PROSECUTION—OMISSION OF SPECIFICATIONS OF NEGLIGENCE.—The plaintiff suffered an involuntary non-suit in an action for negligence, and in a second action he abandoned certain specifications of negligence upon which he had relied in the prior suit. The defendant thereupon counterclaimed for malicious prosecution. *Held,* there was no termination of the prosecution. *Hales* v. *Raines* (Mo. 1911) 141 S. W. 917.

While it is fundamental that a plaintiff in malicious prosecution must show a favorable termination of the prosecution, *Fisher* v. *Bristow* (1779) I Doug. 215, this requirement is satisfied if the prosecution is disposed of so that it cannot be revived, *Clark* v. *Cleveland* (N. Y. 1844) 6 Hill 344, and the prosecutor, if he would proceed further, must institute proceedings *de novo. Apgar* v. *Woolston* (1880) 43 N. J. L. 57, 66. Accordingly it seems that proof of an involuntary non-suit

will ordinarily support an allegation that the previous action has terminated, although it is not an adjudication of the merits, *Manhattan Life Ins. Co.* v. *Broughton* (1883) 109 U. S. 121, and is no bar to a subsequent action on the same cause. *Harrison* v. *Wood* (N. Y. 1853) 2 Duer 50; see *Merritt* v. *Campbell* (1874) 47 Cal. 543. But where the action for malicious prosecution is brought after the second suit has been commenced, an exception is made to the general rule, see *Schippel* v. *Norton* (1888) 38 Kan. 567; *Bacon* v. *Towne* (Mass. 1849) 4 Cush. 217; *Sharpe* v. *Johnston* (1882) 76 Mo. 660, within which the principal case falls. Since only one primary right of the plaintiff was invaded by the defendant's wrongful act, but a single cause arose, Pomeroy, Code Rem., (4th ed.) § 346 *et seq.*, and, persisting after the non-suit, it was the basis of the second action. That certain specifications of negligence were there omitted is immaterial, for in actions of negligence a general allegation of the character of the wrong sufficiently comprehends the details. *Rice* v. *C. B. & I. Ry.* (Mo. 1910) 131 S. W. 374; see *King* v. *C. M. & St. P. Ry.* (1900) 80 Minn. 83.

MECHANIC'S LIENS—MATERIALS NOT INCORPORATED IN BUILDING—DEPRECIATION IN VALUE.—The plaintiff sought to enforce a materialman's lien for lumber furnished to be used in molding concrete forms for a building. The lumber had been greatly depreciated in value by such use. *Held,* the lien should be allowed. *Carlington Lumber Co.* v. *Westlake Construction Co.* (Mo. 1911) 141 S. W. 931.

Although the origin of the materialman's lien on real property is purely statutory, *Cin. R. R. Co.* v. *Shera* (1905) 36 Ind. App. 315, there are certain uniform requirements for its enforcement. The lienor must have intended to rely for his security upon the particular building for which the materials were furnished. 2 Jones, Liens, § 1330. Clearly, then, the lien cannot be enforced against another structure in the building of which they have been used. *Heaton* v. *Horr* (1875) 42 Ia. 187. But since it would be especially burdensome upon the vendor to make his security depend on the conduct of the vendee, the lien will be enforceable against the building for which the supplies were furnished, regardless of their actual disposition. 10 COLUMBIA LAW REVIEW 481; *Beckel* v. *Petticrew* (1856) 6 Oh. St. 247. Nor is the lien dependent upon their permanent incorporation in the building, *Chemical Co.* v. *G. & N. R. R.* (1894) 59 Mo. App. 6, if when used for the purpose for which they are bought, their identity and further usefulness will be destroyed. *Sampson Co.* v. *Comw.* (1909) 202 Mass. 326. Thus, while the contractor acquires no lien upon the structure for the cost of tools designed for his repeated use, *Basshor* v. *B. & O. R. R. Co.* (1885) 65 Md. 99, a lien does arise from the use of powder for blasting, *Giant Powder Co.* v. *Ore. Pac. Ry. Co.* (1890) 42 Fed. 470, or the use of lumber for purposes similar to that for which it was furnished in the principal case. *Lumber Co.* v. *Paper Mills Co.* (1911) 146 Wis. 12. *Cf. Oppenheimer* v. *Morrel* (1883) 118 Pa. 189.

NEGLIGENCE—STATUTE IMPOSING A DUTY—CONTRIBUTORY NEGLIGENCE.—To an action for injuries sustained through the explosion of oil sold by the defendants in violation of a statute forbidding the sale of oil of that quality, the defendant pleaded contributory negligence. *Held,* the defence was good. *Morrison* v. *Lee* (N. D. 1911) 133 N. W. 548.

It is clear that a plaintiff should not be permitted willfully or

recklessly to expose his person or property to a known danger and then to hold the defendant for the ensuing loss, although the danger results from the latter's violation of a statute. Accordingly the defendant may commonly plead *volenti non fit injuria* in such cases. *Welty* v. *R. R. Co.* (1885) 105 Ind. 55. But whether the plaintiff may be defeated only by proof of conduct which will sustain that defence is a disputed point. It is, of course, a question of statutory construction which is largely affected by considerations of policy. The courts which construe strictly statutes similar to the one under consideration uphold the defence of contributory negligence, thus restricting the statute to a definition of the defendant's duty under given circumstances. *Schutt* v. *Adair* (1906) 99 Minn. 7. Nor is their interpretation different when the statute expressly abolishes the defence of assumption of risk. *Schlemmer* v. *Buffalo, etc. Ry. Co.* (1910) 220 U. S. 590; *Dumphy* v. *N. Y. etc. R. R. Co.* (1907) 196 Mass. 471. In other jurisdictions, the defendant is held liable regardless of the plaintiff's negligence on the theory that as the legislative intent was to protect not a given individual but a class or the public at large, *Flint etc. R. R. Co.* v. *Lull* (1874) 28 Mich. 510, the defendant must be held strictly accountable for his acts *Caspar* v. *Lewin* (1910) 82 Kan. 604. It may be noted that there is a like difference of opinion as to whether a servant may assume the risk of his master's failure to provide statutory safe-guards. 5 COLUMBIA LAW REVIEW 402.

PATENTS—CONDITIONAL LICENSE—ELECTION OF REMEDIES.—In consideration of the right to manufacture under the complainant's patent, the defendant, as a "condition of the grant of the license" agreed to affix a specified label to each machine, which he subsequently failed to do. *Held,* the patentee could consider the defendant an infringer, or sue him on the contract. *Indiana Mfg. Co.* v. *Nichols & Shepard Co.* (C. C. E. D. Mich. 1911) 190 Fed. 579.

It is well settled that as long as a license contract remains in force, the licensee cannot be liable for an infringement, even though he may have been guilty of a breach of covenant to pay royalties. *White* v. *Lee* (1880) 3 Fed. 222; *Consol. Purifier Co.* v. *Wolf* (1886) 28 Fed. 814. Nor will an express reservation of power to rescind on breach of such a covenant *ipso facto* work a revocation. *Dental Mfg. Co.* v. *Nat'l Tooth Co.* (1899) 95 Fed. 291; see 2 Robinson, Patents, § 822. Therefore, until the patentee has secured a rescission by means of a bill in equity, *Adams* v. *Meyrose* (1881) 7 Fed. 208, his sole remedy is on the contract, *Hartell* v. *Tilghman* (1878) 99 U. S. 547; *Goodyear* v. *India Rubber Co.* (1857) 4 Blatch. 63, though an absolute repudiation by the licensee will make him an infringer. *Cohn* v. *Nat'l Rubber Co.* (1878) 3 Ban. & A. 568. An altogether different class of cases is presented, where the patentee has placed certain restrictions upon the operations of his licensee. When the latter, as in the principal case, acts in excess of his authority, it is clear that to this extent he occupies the same position as any other infringer, and that the license can afford him no protection. *Button-Fastener Co.* v. *Eureka Spec. Co.* (1896) 77 Fed. 288; *Cortleyou* v. *Johnson Co.* (1905) 138 Fed. 110. The patentee can, therefore, elect to consider him an infringer or to sue on the contract which has also been broken. *Pope Mfg. Co.* v. *Owsley* (1886) 27 Fed. 100; *Union Mfg. Co.* v. *Lounsbury* (1869) 41 N. Y. 363.

PLEADING AND PRACTICE—APPEARANCE—WAIVER OF OBJECTIONS TO JURISDICTION.—The defendants appeared specially and interposed pleas to the jurisdiction of the court over their persons. One defendant also demurred on the ground that the bill showed no cause for relief. These defences were overruled, and the case was decided on the merits. *Held,* the objections to the jurisdiction had not been waived and were not, therefore, sustainable on appeal. *Southern Pac. Co. et al.* v. *Arlington Heights Fruit Co. et al.* (C. C. A. 9th Cir. 1911) 191 Fed. 101.

To constitute a waiver of a court's lack of jurisdiction of the person, the facts must show an intention to abandon the objection or be such as to make it inequitable for the party to insist upon the objection. See *Stonega Coal & Coke Co.* v. *L. & N. R. R. Co.* (1905) 139 Fed. 271. If a special appearance be made for the sole purpose of objecting, the court must determine its jurisdiction before considering the merits, *Central etc. Exch.* v. *Board of Trade* (1903) 125 Fed. 463, and if the objection is overruled the defendant may answer to the merits and reassert it on appeal. *Harkness* v. *Hyde* (1878) 98 U. S. 476. The right to enter such an appearance is a mere privilege which must be exercised according to the strict rules of practice. *Mahr* v. *Union Pac. R. R.* (1905) 140 Fed. 922. Thus a general appearance will be treated as a waiver, even though the only subsequent step is a plea to the jurisdiction, *Interior Const. Co.* v. *Gibney* (1895) 160 U. S. 217, and an appearance will be treated as general if a plea to the merits is added to one to the jurisdiction, *Texas & Pac. Ry.* v. *Cox* (1891) 145 U. S. 593, irrespective of an express reservation of the objection. *Crawford* v. *Foster* (1898) 84 Fed. 939. It would seem that the court in the principal case failed properly to discriminate between those defendants who pleaded only to the jurisdiction, and as to whom its ruling is correct, see *Davidson Marble Co.* v. *Gibson* (1909) 213 U. S. 10, and the defendant who by demurring to the merits must be considered as having waived his jurisdictional objection. *St. Louis Ry. Co.* v. *McBride* (1891) 141 U. S. 127.

PLEADING AND PRACTICE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—ADMISSIONS OF PARTY MADE AFTER JUDGMENT.—After judgment in his favor, the plaintiff made admissions inconsistent with his testimony given during the trial. *Held,* they constituted newly discovered evidence warranting a new trial. *Guth* v. *Bell* (Ia. 1911) 133 N. W. 883.

Evidence is objectionable, as cumulative, when it is of the same general character as that previously given, and of the same fact which was the subject of proof before. *Waller* v. *Graves* (1850) 20 Conn. 305. It is not cumulative, however, merely because it tends to establish the same *factum probandum,* if it be dissimilar in kind to the evidence already given. *Guyot* v. *Butts* (N. Y. 1830) 4 Wend. 579. Declarations of a party as to the truth of an issue, which are discovered after judgment, may therefore be made the ground of a new trial, *Gardner* v. *Mitchell* (Mass. 1828) 6 Pick. 114, though the admissions may conflict with the party's testimony, *Strout* v. *Stewart* (1874) 63 Me. 227; *Preston* v. *Otey* (1891) 88 Va. 491; but see *Ritter* v. *Phillips* (N. Y. 1872) 2 J. & S. 289, or be of the same tenor as others sought to be proved on the former trial. *Means* v. *Yeager* (1896) 96 Ia. 694; *contra, Cox* v. *Harvey* (1876) 53 Ind. 174. Where the admission is made after judgment and the opposing party takes

advantage of it within the time permitted for a motion for a new trial, it would seem that a new trial should likewise be granted, whether the admission be made by conduct, *Gole* v. *Fall Brook Coal Co.* (1891) 40 N. Y. St. Rep. 834, or verbally. *Welch* v. *Nasboe* (1852) 8 Tex. 189; *Wall* v. *Trainor* (1882) 16 Nev. 131; but see *Sullivan* v. *O'Conner* (1882) 77 Ind. 149.

SPECIFIC PERFORMANCE—PROPERTY INJURED WITHOUT FAULT OF PARTIES —BURDEN OF LOSS.—The plaintiff and the defendant having entered into a contract by which the latter agreed to purchase certain lands, the city acquired, prior to the time for performance, an indefeasible right to condemn a part of such land. This fact the plaintiff pleaded as an incumbrance, in reduction of the purchase price. *Held,* the burden of loss must fall upon the purchaser. *Nixon* v. *Marr* (1911) 190 Fed. 913. See Notes, p. 257.

STATUTE OF FRAUDS—VERBAL AGREEMENT TO BECOME A GUARANTOR—PART PERFORMANCE—SPECIFIC ENFORCEMENT.—The plaintiff sought specific performance of the defendant's oral promise both to become guarantor upon a lease to be made by the plaintiff with a third party, and to reduce his promise to writing. The defendant's undertaking was made in consideration of the plaintiff's promise to free him from a lease. This the plaintiff had done, and had re-leased the premises. *Held,* specific performance would not be decreed. *Goldsmith* v. *Tolk* (1911) 203 N. Y. 47, aff'g 138 App. Div. 287.

Although the party performing may often recover in quasi-contract for the benefits conferred, part performance does not remove a contract from the operation of the Statute of Frauds at law. *Creighton* v. *Sanders* (1878) 89 Ill. 543. A court of equity, however, may enforce such a contract if the defendant has permitted the plaintiff to alter his position in performance or pursuance of the contract, *Brown* v. *Hoag* (1886) 35 Minn. 373, in reliance upon conduct of the defendant equivalent to a representation of his intention to perform. *Ryan* v. *Dox* (1866) 34 N. Y. 307; *Wheeler* v. *Reynolds* (1876) 66 N. Y. 227. The doctrine of part performance has been almost entirely confined to contracts relating to realty, Browne, Statute of Frauds, (5th ed.) § 460-*a,* and it is often declared that the jurisdiction of equity over parol agreements partly performed is thus restricted. *Osborne* v. *Kimball* (1889) 41 Kan. 187; *McIlroy* v. *Ludlum* (1880) 32 N. J. Eq. 828. The correct view, however, would seem to be, that if a contract, whatever its subject-matter, is such that equity would decree its performance were it in writing, a like decree may be rendered though the agreement be parol, if necessary to relieve against fraud. Browne, Statute of Frauds, (5th ed.) § 460-*a; In re Little River Lumber Co.* (1899) 92 Fed. 585; *Equitable Co.* v. *Coal Tar Co.* (1885) 63 Md. 285. Under this view, specific performance should have been granted in the principal case. Not only was the defendant's conduct such as to give the court jurisdiction, but the plaintiff had no other adequate remedy, and the contract, because of the speculative character of the damage which would result from its breach, was such an one as should be specifically enforced if in writing. *Cf. Hermann* v. *Hodges* (1873) L. R. 16 Eq. 18; *Rowell* v. *Smith* (1905) 123 Wis. 510.

TRUSTS—PAROL AGREEMENT TO EXCHANGE LAND—CONSTRUCTIVE TRUST. The plaintiff conveyed his interest in certain land to the defendant in consideration of the latter's oral promise to convey to the plaintiff another parcel of land. The defendant refused to perform, setting up the Statute of Frauds. *Held,* three judges dissenting, the defendant was a constructive trustee of the land received. *Deming* v. *Lee* (Ala. 1911) 56 So. 921.

Good conscience forbids that one should retain a legal title obtained by mistake, *Brown* v. *Lamphear* (1862) 35 Vt. 252, or fraud, *Long* v. *Fox* (1881) 100 Ill. 43, or disregarding a confidential relationship, *Bowler* v. *Curler* (1891) 21 Nev. 158, and equity often makes one so situated a constructive trustee. Since a constructive trust is an obligation imposed by law, it falls within the exception expressly made in the Statute of Frauds, and it should make no difference that relief thus afforded effectuates a result identical with that of enforcing an oral promise. Stone, Resulting Trusts, 6 COLUMBIA LAW REVIEW 326. This view is taken by the English courts, *Haigh* v. *Kaye* (1872) L. R. 7 Ch. App. 469; *In re Duke of Marlborough L. R.* [1894] 2 Ch. 133, and is gaining favor in the United States. *Alexander* v. *McDaniel* (1899) 56 S. C. 252. However, many courts hold that where a conveyance of land has been induced by a parol promise to reconvey, the grantor's only remedy is in quasi-contract, *Smith* v. *Hatch* (1865) 46 N. H. 146, and specific restitution is denied because, it is claimed, to allow it would be a virtual abrogation of the Statute. *Patton* v. *Beecher* (1878) 62 Ala. 579; *Williams* v. *Williams* (1899) 180 Ill. 361. But when, as in the principal case, the agreement is to exchange lands, to make the defendant a trustee of the land conveyed would not be compelling a performance of his oral promise and there seems to be no reason for denying such relief, *Dickerson* v. *Mays* (1882) 60 Miss. 388, though some courts require that actual fraud be shown. *McClain* v. *McClain* (1881) 57 Iowa 167. But see *Koefoed* v. *Thompson* (1905) 73 Neb. 128.

WILLS—RULE AGAINST PERPETUITIES—SUBSTITUTED DEVISEE.—The testator devised real estate to trustees to convey to the church of G. S. and if "said church * * * be incapable of taking * * for the space of one year and eleven months * * then * * within thirty days * * to convey" to the church of M. *Held,* while the first gift was void, as the church of G. S. was not incorporated, the second was valid as a substituted devise. *Washburn et al.* v. *Acome et al.* (1911) 131 N. Y. Supp. 963.

Since the Rule against Perpetuities operates in defeasance of intention, Gray, Rule against Perp., (2nd ed.) § 475, the primary intention of the testator is the sole object of inquiry in construing a will. Hawkins, Prin. of Legal Interp., cited in Thayer, Prelim. Treat, 580, 581. It is therefore immaterial if the ultimate intention is defeated by the operation of the Rule. *Dungannon* v. *Smith* (1846) 12 Cl. & F. 546, 599. Thus, where there are several successive limitations, the first of which is void as within the Rule, the following gifts must fail also, as the intention is to postpone them until the natural termination of the first estate. See *Rose* v. *Rose* (N. Y. 1863) 4 Abb. Ct. of App. Dec. 108. In case of the limitation of a life estate to a person incapable of taking, however, with a remainder over to an ascertained person *in esse,* the vested remainderman takes immediately. 2 Reeves,

Real Property, § 910; *U. S. Trust Co.* v. *Hogencamp* (1908) 191 N. Y. 281. This, however, is not the position of the limitations in the principal case, for there is no intention that the second gift vest immediately upon the failure of the first. While this would not necessarily fail by the English Rule, see Gray, Rule against Perp., (2nd ed.) § 201, as the New York Rule prohibits a gap of even a day which is not measured by lives in being, *Smith* v. *Chesebrough* (N. Y. 1903) 82 App. Div. 578; Fowler, Real Property, (3rd ed.) 269, it would seem that the limitation should have been held void, for by the most liberal construction there is a clear provision for the possibility of a gap of thirty days at least and it is obvious that this should not be disregarded for the sole purpose of saving the limitation.